QUALIFIED MARTIAL LAW, A LEGISLATIVE PROPOSAL.

I.

THE LEGISLATIVE PROBLEM.

WHEN it is considered that there has been scarcely a year since the beginning of the Government that the Army has not been called upon to quell disturbances too great for the state authorities to handle; and that during the last thirty-five years the state troops have been called out more than five hundred times, the extent to which we are dependent upon the military are as a police force may be better realized.[1]

The most serious riots and occasions for so-called "Martial Law" arise from labor disputes. These do not show any tendency to decrease in frequency, duration, or violence. One cause of dangerous friction and of unnecessary violence and bloodshed in protracted strikes repeatedly appears, viz., the incredible uncertainty as to the legal status and powers of the National Guard of the various states when called out on riot duty, and, to a lesser degree, of the United States troops when called on to protect the state against domestic violence. The draft herewith submitted of a uniform state military code has been called forth particularly by the recent occurrences in Colorado, West Virginia, and Montana, where questions as to military powers and abuses have given much trouble and have come before the highest courts as well as investigating commissions.

It would be well for the American people and legislatures to give serious attention to the conflicting views held by military men, by courts of law, and by workingmen, as to martial law, and to the disastrous results of this conflict to all concerned. These views, the military and the legal, should be reconciled, if possible, by one or both making the proper concessions to the other, and a just and certain standard should be authoritatively established. If the law as it now stands does not vouchsafe the military adequate powers, the law should be amended and their present authority should be increased. If, on the other hand, there are grave abuses of military power in industrial conflicts, as labor generally believes to be the case; if military power is used to overawe legitimate industrial protests and attempts to better conditions of labor, then methods should be devised to restrain these possible abuses in order that economic

[1] Federal Aid in Domestic Disturbances, p. 260, W. D. 1903.

troubles may not be aggravated by the additional irritant of political oppression.

The state owes it to its citizens to define much more accurately just how far the military have a right to go and what are the limits and the extent of their powers and duties. This duty is owed both to its citizens who are struggling against starvation and other odds for what they regard as their just rights and dues in the division of the products of labor, and also to those who are called upon to perform military duty during strikes. If military powers under proclamations of martial law be so extensive as military men believe, our constitutional guaranties, at least the personal ones, become mere scraps of paper. The tendency towards the arbitrary exercise of power is great, wherever power is lodged, and the use of the militia in labor disturbances has afforded no exception.

To the country at large, the first essential of the National Guard or organized militia must be readiness for service in war. This proposed code does not deal with that feature, nor with methods of organization and military discipline, which are already fairly well covered by statute.[2] It deals primarily with the relations between the military or state police and the citizen which the statutes thus far have not attempted to regulate or to define.

In order to understand the provisions of the code, it will be necessary to consider the divergent views held with regard to the status of the military, which will illustrate the necessity for some such legislation as that here submitted.

1. *Extreme Military View.* According to the extreme military view, absolute martial law may be proclaimed by the executive. This means that the will of the commander is law. Under this view, whatever the soldiers may do, under orders, is above the law. This creates the same situation as military occupation of enemy territory in a public war, and those engaged in labor disturbances are to be treated as the public enemy, with no legal rights.

Military men argue that the troops are only called out when local peace officers have failed in the exercise of their powers. Control must be gained before anarchy is supreme. Hence, the military should have the most ample powers to accomplish results in the shortest possible time, and all constitutional guaranties must be suspended. The more severe the measures of repression the better the effect on the community.

[2] See Circulars No. 8 and 13, Division of Mil. Affairs, 1913, as to organization. Report of Chief. Div., Mil. Affairs, 1914, p. 207.

2. *Radical Labor View.* This radical view is reciprocal to the extreme military view and holds that the military are to be regarded as the public enemy and to be treated as such. It is charged that the military on strike duty are always arrogant oppressors of the poor and tools of capital and tyranny. Any state police system should be opposed as a system of American Cossacks, designed to uphold Property against Humanity and Liberty. Military men are victims of military megalomania. The grandeur of epaulets and uniforms, the rattle of guns and sabres, the ringing of commands, the blare of trumpets, the spirit-stirring drum, the ear-piercing fife, and all the pomp of war turn the head of the erstwhile peaceful militia man with the madness of militarism and the delusion that he is above the law.

3. *Common Law View.* The orthodox view is that the military is always in strict subordination to the law. Proclamations of martial law amount to nothing. The military cannot make law or suspend the constitution. The soldier is simply an ordinary peace officer whose duty it is to execute and enforce the law. The status of the civilian remains the same when the military is called out as before its advent, and he has all his rights, privileges, and immunities under state and federal constitutions.

4. *Qualified Martial Law.* The proposed Code is a compromise which has been drafted on the theory of allowing to the military certain increased powers and immunities in time of insurrection, but preserving, at the same time, the supremacy of the law and the constitution. The problem is, How far to extend military authority beyond that of ordinary peace officers; or, in another aspect, how far military necessity diminishes the normal safe-guards and remedies of civilians. The fundamental principle is that of a union between responsibility and power. Power without responsibility can never be duly controlled. Every public officer should have clear and definite authority to do the acts required of him; and should be responsible to the law for abuse of power. The great body of rights and liberties which have grown up through many centuries of political development need not be entirely abandoned on the pretext of military necessity.

In order to ascertain what is needed in the way of legislation it will be necessary to examine the military view of martial law somewhat in detail, and in connection therewith, the military criticism of the powers vouchsafed by the common law. We shall inquire what martial law is before we consider the question, how far it can and should exist in America.

II.

THE MILITARY VIEW OF MARTIAL LAW.

Mr. W. F. FINLASON, an English Lawyer, is perhaps the ablest legal advocate of the extreme military view of martial law. According to him, martial law is only legal in time of rebellion which amounts to war.[3]

Martial law depends upon the question whether there is *war,* not upon any proclamation. This may be a question of great doubt. Whenever the courts are powerless and the peaceable course of justice is stopped some claim it is to be deemed a time of war, and the maxim, *Inter arma silent leges,* applies. The declaration of martial law is only the formal acceptance and recognition of the existence of a state of war already begun. It places under absolute military power all the inhabitants of the district and subjects them to military rule, as if they were enemies in a public war. By rising in rebellion the rebels forfeit all their constitutional rights and this applies to the entire population of the district which is in a state of rebellion.

Martial law, then, is nothing more nor less than a declaration of war by the sovereign against his subjects, in consequence of a prior levying of war by them. This is the fundamental principle. All those in the district in a state of rebellion are outlaws and rebels, whether actively employed in support of the rebellion or not. Martial law (if it can exist) means the establishment of absolute discretionary military authority, such, as in times of war, is exercised against the enemy. The military measures to be adopted are a matter of military discretion. The summary infliction of flogging or death, the burning of houses, and other measures would all be legal though employed against prisoners or other persons not in actual resistence. It is of the very essence of martial law that it involves a power of military punishment more speedy and terrible than the proceedings of ordinary law. It is not limited to measures of necessity. Since there is absolute discretionary authority to do anything which could possibly be termed necessary or expedient, there can be no legal liability as regards those who give or obey military orders. Martial law deals only with rebellion so formidable as to amount to war and to require measures of war. It is an independent power of action when riot turns into rebellion too serious for military force acting merely in aid of the civil power.

Military government is what exists today in Belgium, being exercised by a foreign invader. Martial law is the same thing at home exercised by the military over the citizen, considered as an enemy.

[3] Finlason, Treatise on Martial Law. See also Tilonko v. Atty. Genl. [1907] App. Cases 93 (Privy Council).

III.

MILITARY CRITICISMS ON COMMON LAW POWERS.

The suppression of actual insurrection, the resistence of outward acts of rebellion, may be effected without martial law, as Lord MANSFIELD showed on the occasion of the Lord George Gordon riots, in 1780, in which over 450 persons were killed or wounded by the military. The common law provides ample powers for the resistance of actual outrage, even to the extent of inflicting death, if necessary. Any person, whether soldier or citizen, may lawfully resist or disperse an unlawful or riotous assemblage. Any one may put to death persons in the actual commission of felony, the burning of houses, etc., if otherwise unable to restrain them.

FINLASON, however, contends that the common law powers of the military are inadequate for the following reasons:

The great difficulty at common law is to hit the precise line between justification and excessive force, as justification depends upon proof of apparent necessity. If it is possible to arrest those who are in open rebellion, they must be arrested and tried at common law. It is not lawful to kill them unless apparently necessary to prevent a present act of felony or overcome forcible resistance.

At common law it is not lawful to inflict death for the prevention of what is a mere trespass or misdemeanor. Only under the riot act can deadly force be used for the dispersion of rioters, since at common law riot is a mere misdemeanor. The riot act does not authorize attacks or firing by the military upon bodies or mobs of people merely because they are unlawful and tumultuous, when not felonious. Only after a riot has continued for an hour after proclamation to disperse does it became felonious.

A summary power of arrest of those who incite riot and disorder is necessary. The common law is based upon a theory of peace and the supremacy of law. It is provided for ordinary times and circumstances, and makes no adequate provision for times when the civil power is paralyzed.

Common law prosecutions and punishments are too dilatory to put down rebellion. Martial law allows of summary procedure and military executions. In a great public emergency, public safety is the paramount object and individual security must give way. (On the other hand, it may be suggested that a fierce and exasperated soldiery should not be made at once judge, jury, and executioner).

It is further contended by military lawyers that the military should have full discretion as to tactics and should not be limited to mere

necessity, unless taken in the larger sense of expediency, with reference to the suppression of the rebellion. This should depend upon the judgment of the officer in command.

The guaranties in the federal constitution and the state constitutions are peace provisions and become silent in time of war. Lawbreakers have forfeited all of their rights to protection or consideration as against the troops.

Leaders of insurrection, when arrested, must not be turned over to the civil authorities and perhaps admitted to bail to take their place again as leaders of the insurrection.

When called upon to save the community from the mob, the military should not act under the burden, risk and restraint of having to make out a justification for their acts by legal evidence. The efficiency of the military should not be impaired by court writs or orders. The militia should not be required to jeopardize their freedom and their property in putting down mob violence.

They should not be called upon to prove in court the precise amount of force which appeared reasonably necessary to an officer in a given emergency when menaced by rioters.

Subordinates should not be permitted to question the lawfulness of military orders at a critical time. Unlawful acts should be excusable by orders received from military superiors.

Finally, it is contended, the militia should be left solely to the control of military discipline, under provisions similar to, if not identical with, the Articles of War and the United States Army Regulations. You cannot combine civil responsibility and martial law, it is claimed. Therefore, the thing to do is to legalize the circumstances under which martial law may be proclaimed by the Governor. The whole subject of the relations of the civil and the military may be covered adequately by providing that troops when called out by the Governor shall be subject to the Articles of War and the Army Regulations of the United States Army, so far as applicable, with no jurisdiction in the ordinary courts, and no remedies allowed to citizens for abuse of power.[4]

IV.

AMERICAN DECISIONS AND STATUTES ADOPTING EXTREME MILITARY VIEW.

A few states, particularly West Virginia, Idaho, Colorado, and Pennsylvania, have gone to a surprising extent in recent years in supporting extreme doctrines of martial law. The West Virginia

[4] But Art. 59 of the Articles of War recognizes the prior jurisdiction of the ordinary courts, except in time of war, in criminal matters.

court holds in effect that the Governor of the state may, by proclamation of martial law, confer upon himself and on his military representatives a supreme and unlimited power over all his fellow citizens within a described area, which suspends the functions of the civil courts and magistrates and substitutes in their place the mere will of the military commander. A military commission or summary court may be established as a substitute for the ordinary courts, to try civilians for crime or disobedience of military orders and proclamations. The military may disregard the writ of habeas corpus or other process of the courts, if issued. If the military take life or injure person or property, they are immune from civil suit or criminal prosecution, even for unreasonable acts, and the ordinary courts are without jurisdiction to review the legality of military measures. The military may arrest without warrant, merely on suspicion, and may hold and detain prisoners so arrested for indefinite periods, at their discretion, without charge of crime and without turning them over to the civil courts for preliminary examination, bail, or for trial. They may exercise a censorship of the press and suppress newspapers at their discretion. They may prescribe to employers what classes of laborers they shall or shall not employ. They may forcibly enter and search private houses and seize property therein, without a search warrant. They may issue peremptory orders and proclamations to the citizens generally, having the force of law.[5]

It is contended that martial law power even extends to the summary trial and punishment of offenses committed previous to the proclamation of martial law, or at least to all offenses committed in connection with the insurrection. Offenders may be arrested out of the proclaimed district and brought into it for trial, even if they have never personally been there, if their publications or acts have caused trouble or mischief there; or if they have participated in conspiracy or incitement connected with the insurrection. The continuance of martial law depends upon considerations of military exigency of which the Governor is the judge.

Before considering the provisions of the proposed military code, it may be well also to glance briefly at the existing legislation which deals with this subject, from the extreme military standpoint.

[5] State v. Brown, 71 W. Va. 519, 77 S. E. 243, and notes thereto in 45 L. R. A. (N. S.) 996, and Ann. Cas. 1914C. 1; Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (N. S.) 1030; Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533, L. R. A. 1915A 175; W. E. Burkhimer, Military Govt. and Martial Law (2nd ed. 1904) Chaps. 24 and 25; Winthrop, Military Law (2nd ed.) pp. 1274-1278; Ex parte Field, 9 Fed. Cas. 1; Re Boyle, 6 Idaho 609, 45 L. R. A. 832; Re Moyer, 35 Colo. 159, 85 Pac. 190; Comm. v. Shortall, 206 Pa. St. 165, 65 L. R. A. 193. See also In Re Kalanianaole, 10 Hawaii 29.

In a number of states, statutes prescribe the occasions upon which martial law or a "state of insurrection and rebellion" may be declared by the Governor, but there is no attempt at definition of what the legal consequences of such a declaration may be. In many states there are also statutes asserting in the broadest terms that members of the militia shall not be liable, civilly or criminally, for acts done while in active service.

Thus, by the laws of Illinois,[6] "Should any member of the National Guard or Naval Reserve of Illinois, either an enlisted man or commissioned officer, while in the discharge of his duty on active service, in pursuance to orders from a superior authority, take life or injure any person or persons or their property, the acts shall be deemed justifiable and lawful and he shall not be prosecuted therefor in any court, or incur any civil liability by reason thereof."

It is also provided that a military officer shall exercise his discretion and be the sole judge as to what means are necessary for the work to be done or the results to be attained. By Section 208, officers and military force shall be held guiltless of any crime and justified in law in killing and wounding any persons in their efforts at dispersing an unlawful or riotous assembly.

Not a word is said as to excessive force or abuse of discretion. Military immunity alone is considered.

By the New York Military Law, Sec. 14, members of the National Guard, on active service, shall not be liable, civilly or criminally, for any acts done by them while on duty. No officer or member of the militia, while acting under orders from the commander-in-chief, shall be liable to any action, civil or criminal, in any court, for any act committed within the scope of his orders on duty, and in obedience thereto.

By a Louisiana statute[7] there are similar provisions to the effect that militia men shall not be liable, civilly or criminally, for any act while on duty, but shall be liable only to court-martial. The act was considered by the Louisiana court in *O'Shee* v. *Stafford,*[8] and the court declared that the law-maker could not exempt superior officers from civil responsibility for torts, or deny to the citizen, for injury done him, adequate remedy by due process of law, in plain contravention of the constitution.[9]

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[6] Military and Naval Code, Art. XX, Sec. II.

[7] Stats. 1914, p. 371.

[8] 122 La. 444, 47 So. 764, 16 Ann. Cas. 1163.

[9] See also Johnson v. Jones, 44 Ill. 142.

V.

THE CODE; CHAP. I. POWERS AND STATUS OF THE MILITARY.

We shall now consider briefly the fundamental provisions of the proposed military code, which attempts to make a proper adjustment of the use of force to the safeguards of constitutional liberty.

We shall pass over the first five sections as self-explanatory, with the exception of Sec. 2, which will be considered later. Secs. 6 and 7 deal with the occasions and authority for calling out the militia. The Governor may, by the constitutions of most states, call out the militia to execute the laws, to suppress insurrection, and repel invasion.[10] The Governor is the judge in determining when an exigency has arisen for calling out the militia to preserve the peace of the state, just as the President is the judge of when an emergency has arisen for calling out the federal troops. If the military are called out the Governor or his military representative becomes supreme in command. A subordinate military officer, a judge, mayor, or sheriff are none of them, in the absence of statute, authorized to call out the National Guard, but provisions are made in several states that if there is not time or opportunity for communicating with the Governor, the militia may be provisionally called out by some of these local authorities.[11]

The military is in all states except New York declared forever subordinate to the civil power. As it is put in the Massachusetts Declaration of Rights, Art. XVII., "And the military power shall always be held in exact subordination to the civil power, and be governed by it." It has been supposed by some courts and writers that this means that the military can only act under the orders of the civil peace officers and in aid of sheriffs and other magistrates.[12] This would seem clearly to be an error. The words used are "civil power" and not "civil officers." This provision does not say that the militia shall be put under the command of local peace officers. The section is found in the various Bills of Rights and is put there to insure subordination to law, so that under no pretense shall the civil law be subverted or displaced, and the arbitrary rule of martial law be substituted therefor. It is a declaration to the effect that martial law shall not be declared, but that all citizens and soldiers alike shall be subject to the laws of the land and answerable to the

[10] Stimson, Federal and State Constitutions, Sec. 298, p. 347.

[11] Chapin v. Ferry, 5 Wash. 386, 15 L. R. A. 116; Commonwealth v. Shortall, 206 Pa. St. 165, 65 L. R. A. 193.

[12] State v. Coit, 8 Ohio Dec. 62; Ela v. Smith, 5 Gray 121.

courts. The Governor is the chief conservator of the peace, and the militia under his control is as subordinate to the civil power, (viz., the law) as if under control of the sheriff.[13]

Sec. 9 defines the general powers and status of the military, and is perhaps the most fundamental section of the entire code, as it covers a matter which hitherto has lacked definition. Officers and soldiers at the English common law have no special privileges as to the use of force. A soldier, for the purpose of establishing civil order, is only a citizen armed in a particular manner. He cannot, because he is a soldier, excuse himself if, without necessity, he takes human life.[14]

A very well considered Kentucky case has taken a step beyond this and has given the militia the status of peace officers. In *Franks v. Smith*[15] it is declared, as a matter of common law, that the orders which a soldier on riot duty is justified in executing are confined to such as a peace officer may execute in the discharge of his duty. The soldier has the same measure of protection and is subject to the same liability, whether he is acting under orders of a military officer or is acting under the direction of the sheriff.

Under English common law a policeman or other peace officer must suffer the consequences of any illegal act or abuse of authority he may commit, and cannot divest himself of responsibility by pleading the orders of his superior officer. The Continental theory, on the other hand, evolved from the necessities of autocratic government, makes of the police force the strong arm of the ruling classes. The policeman is liable only under special laws administered by special courts regulating the relations of public officials to private citizens. Much more discretion is thus allowed for arrests, searches, third degree methods, restrictions of public meeting, and freedom of discussion; and the English safeguards of personal liberty, by which possible abuses of power may be curbed, are lacking.[16]

[13] See Code Sec. 8; see also Vol. 10, Opinions Atty. Genl. U. S. 79; Franks v. Smith, 142 Ky. 232, 134 S. W. 484, Ann. Cas. 1912D. 319, L. R. A. 1915A. 1141; Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B. 988; Fluke v. Canton, 31 Okla. 718, 123 Pac. 1049, 1054, 134 S. W. 484, L. R. A. 1915A. 1141. See also authorities collected in dissenting opinions by Robinson, J. in State v. Brown, 71 W. Va. 519 at 546, 77 S. E. 243 at 255; and in Ex parte Jones, 71 W. Va., 567 at 623-625, 77 S. E. 1029 at 1053. Also 1 Stephen, History of Criminal Law, 203, 214; W. H. Moore, Act of State in English Law, p. 48; Dicey, Law of the Const. (7th ed.) 538; 2 Hare, Am. Const. Law, p. 906; W. M. Ivins, 18 Albany Law Journal, 85, 107 (Aug. 2 and 10, 1878), Status of the Militia in Time of Riot; 2 Willoughby, Const. Law, 1241; the writer, in 12 Columbia Law Review, 529, 5 Journal of Criminal Law and Criminology, 718, and 1 California Law Review, 413.

[14] Dicey, Law of the Const., Appendix, Note 6; Burdette v. Abbott (1812), 4 B. and Ald. 325, 4 Taunt. 401, 449; State v. Coit, 8 Ohio, Dec. 62.

[15] 142 Ky. 232.

[16] See European Police Systems, by Raymond B. Fosdick.

Thus, by English law, soldiers are not exempt from the jurisdiction of the civil courts. If death or injury to a person results from the illegal exercise of military or naval authority, the responsible parties are liable to criminal and civil proceedings.[17]

Under the English Army Act, Sec. 162 (3), it is the duty of commanding officers to hand over officers or soldiers under their command who are accused of offenses, to the civil power, and refusal to do so or to assist the civil power in apprehending offenders is made a misdemeanor. A soldier in that capacity incurs additional responsibility and becomes subject, at all times, to military law and discipline contained in the Army Act and to army regulations and orders, but he does not escape civil liabilities.

At common law, then, according to the orthodox doctrine, the military is, at most, merely an extension of the police force of the state with the ordinary powers of peace officers, except as these powers are extended by statute. It is even doubtful, at English common law, whether the military are peace officers, and they have often been stated to be merely private individuals. As Lord MANSFIELD said, in his great speech in the House of Lords, on the employment of the military to quell the Lord George Gordon riots of 1780, the persons who assisted in the suppression of these tumults were to be considered as mere private individuals, acting as duty required.

Secs. 9 and 10 provide for the conferring on the National Guard of certain further and additional powers beyond those which may be exercised by peace officers at common law. The statute provides for a kind of qualified military law, after a proclamation by the Governor declaring a given district to be in a state of insurrection. This is very different from absolute martial law. It allows of the use of military force only in aid of the civil power; that is, for the preservation of the laws and the constitution, and for the apprehension, dispersion, and resistance of those in actual outrage. Military power under our constitution, as we have seen, can only be used under, in aid of, and as part of the civil power, that is, according to law and within the limits defined by it.

Military experience and public opinion seem to demand that the National Guard have, in extraordinary emergencies, somewhat increased powers and greater authority than ordinary peace officers. The statute should, however, limit the scope of military discretion to prevent oppression and misguided interference with constitutional rights. The effect of a declaration of a state of insurrection under this Code is not to confer undefined powers and immunities upon

[17] IX. Halsbury, Laws of England, 104, 289, 488.

the military, but merely to give such additional powers as are defined by the Code. Without such a declaration, the military will have all of the powers of peace officers. These will, in many, perhaps in most cases, be sufficient.

Secs. 11 and 12 are designed to indicate the scope of the justifiable use of force against a mob. The question, whether on any occasion the moment has come to fire upon a mob of rioters, depends upon the necessities of the case to prevent serious and violent crime. We have seen the military criticism that at common law the use of armed force is limited to the resistance of felonious outrage, and that before rioters may be fired upon they must be actually engaged in or about to attempt an act of felony not otherwise to be prevented, since one cannot kill at common law to prevent a mere misdemeanor.[18]

Riot was only a misdemeanor at common law, but by a statute of George I, (the Riot Act), it was made a felony for twelve rioters to continue together one hour after a proclamation to disperse and peaceably depart. Such proclamation was absurdly called "Reading the Riot Act." The magistrate might then safely order the troops to fire on the rioters, and charge them sword in hand without further proof of necessity. But this was not intended to require a proclamation, nor to restrict the authority to fire on a mob or to disperse them with the bayonet, in case of necessity, though such popular misconstruction arose. Where a mob is shouting, cursing, hurling rocks, and beating and maiming victims, military officers as well as peaceable citizens, or the sheriff or his posse, may use such force as is necessary to make arrests and disperse the mob, even to the extent of firing to kill.[19]

By Sec. 489 of the United States Army Regulations, troops called into action against a mob are to apply military tactics, and "It is purely a tactical question in what manner they shall use the weapons with which they are armed—whether by fire of musketry and artillery, or by the use of bayonets and sabre, or by both; and at what stage of the operations each or either mode of attack shall be employed." It is further provided, "But as soon as sufficient warning has been given to enable the innocent to separate themselves from the guilty, the action of the troops should be governed solely by tactical considerations involved in the duty they are ordered to perform." Although it is necessary to give the military great discretionary power, it seems erroneous to lay it down broadly that it is purely a *tactical*

[18] See 1 Russell on Crimes, 7th ed. 437.
[19] 1 Stephen, History of Criminal Law, 210.

question in what manner and at what stage of the operations they shall attack the mob. Under the proposed Code the military man is not bound to prove that he weighed with scrupulous nicety the precise amount of force apparently necessary to suppress the disorder, as would be the case at common law. The exercise of a reasonable and honest discretion is all that is required.

Giving due weight to the argument that those who are suddenly called upon to save the community from the mob should not be put upon trial and forced to justify themselves as best they may by strict legal evidence of the apparent necessity of the degree of force used, it would seem that sufficient protection is given when the prosecution is required to offer evidence that the act in question could not have been done in good faith, or in the honest exercise of discretion, or that the acts complained of were reckless, oppressive, wanton, or malicious. While the law should allow wide discretion, it must remain supreme and enforce some sense of responsibility that military force and authority shall be exercised with humanity and justice as well as firmness. Verbal abuse by a mob does not of itself justify a military officer in using severe measures of repression, although it may well justify arrest to prevent working the mob to overt acts. As Sir FREDERICK POLLOCK has pointed out, juries are not likely to take an unduly narrow view of what a man may reasonably or honestly do in the public interest in time of emergency.[20] It seems fair, in meritorious cases, that the expenses of litigation incurred by the servants of the state on account of the discharge of their duties should be borne by the state.

As an example of unjustifiable force threatened against leaders of a mob, the following incident, which occurred at Ludlow, Colorado, on November 13, 1914, may be related. This occurred under the command of one of the best officers of the Guard. A detail of ten men and a sergeant were sent to cover the Ludlow station at train time, to protect strike-breakers. A crowd of strikers, men and women, armed with clubs, came to the depot. The detail was ordered to fix bayonets, and with much grumbling and muttering the depot and grounds were cleared. But the mob refused to move further than the road, and opposed to the ten sentries was a solid mass of strikers, with the club-swinging women in the front rank giving vent to abuse, and a sullen crowd of men in the rear urging the women to violence. If trouble had started, nothing could have prevented some women being bayoneted and others shot. Three leaders of the strikers, Bernardo, Weinberger, and Jones, who were at

[20] F. Pollock, What is Martial Law? 18 Law Quart. Rev. 152.

large in the crowd, were called out by the officer to talk with him. He at once arrested them and held them as hostages. They were turned over to the sergeants with orders to shoot them on the first sign of trouble. They protested that they were not responsible, but admitted that they were leaders of the tent colony. When they saw that the orders would be enforced, they managed to signal the crowd and a large number went back to the colony. As the officer wrote, "They would certainly have been dead men if any trouble had started in that particular crowd."

The measure was apparently successful, but luck was all that saved those militiamen from being guilty of murder.

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(To be Concluded).

DRAFT OF A STATE MILITARY CODE FOR THE GOVERNMENT OF THE ORGANIZED MILITIA IN THEIR RELATIONS WITH CIVILIANS.

AN ACT to define the powers and duties of the National Guard when called out to execute the laws or suppress riot and insurrection, and of the Federal troops when called upon to protect a state against domestic violence.

CHAPTER I.

POWERS AND DUTIES.

Sec. 1. *National Guard.* The organized militia shall be designated the "National Guard of ....," and their powers and duties shall be as provided in this act, which shall be known as the "Military Code."

Sec. 2. *Federal Troops.* When the land and naval forces of the United States or the organized militia of this or other states shall have been called forth by the President of the United States into active service, on application of the state, to protect the state against domestic violence or insurrection, they shall be subject to this act and have the powers and duties hereby given.

Sec. 3. *Commanding Officer.* The Governor shall be Commander-in-Chief of the National Guard, except when called into the service of the United States, and he shall appoint an Adjutant General, whose term of office shall commence upon the first day after the inauguration of the Governor, and shall continue for two years or until his successor is duly appointed and qualified. The Governor shall have power to remove the Adjutant General for cause.

Sec. 4. *Organization.* The organization, armament, and discipline of the National Guard shall be the same as those which are now or may hereafter

be prescribed for the organized militia of the States by the War Department of the United States.

The Adjutant General and all field officers shall be appointed by the Governor from members of the National Guard who shall have served as commissioned officers for at least one year on the active list in the National Guard, or in the Army of the United States.

The word "officer," as used herein, shall designate commissioned officer; the word "soldier" shall include non-commissioned officers, privates, and other enlisted men.

Sec. 5. *Military Regulations.* The State Military Board shall consist of the Governor, the Adjutant General, the Judge Advocate, and two line officers on the active list present for duty to be designated by the Governor. The junior officer shall be recorder of the Board.

The Board shall, from time to time, prescribe such military regulations, not inconsistent with law, as will increase the discipline and efficiency of the National Guard. Such regulations shall conform to those prescribed for the Army of the United States, so far as applicable to state conditions. The regulations prescribed by the Military Board, when approved by the Governor, shall be published in orders.

Sec. 6. *Occasions for Calling Out the Militia.* Whenever the sheriff, with the aid of special deputies and other local peace officers of any district fail or are unable properly to keep the peace, quell any riot, enforce the law or provide safety to person or property, and whenever any emergency or threatened invasions or insurrection, or imminent public danger may require it, the Governor shall send such part of the organized militia as may be necessary into the district affected to preserve or restore the peace.

Sec. 7. *Emergency Calls.* If time will permit, applications for the use of the National Guard shall be made to the Governor; but, in the case of sudden and unexpected riot, insurrection, invasion, or other emergency, so imminent as to render it dangerous to await communication with the Governor, the highest officer of the militia within reach, a judge of the Superior, Circuit, or Supreme Court, the sheriff or mayor, may call out such portion of the National Guard as it may be possible to assemble, and take such action as circumstances may require. He will promptly report his action to the Governor and Adjutant General, by telegraph, if possible. The Governor may, in his discretion, recall the troops. The Governor is the exclusive judge of the existence of an emergency justifying the ordering out of the National Guard.

Sec. 8. *Relations to Ordinary Peace Officers.* The Governor, as Commander-in-Chief, shall, through his officers, control and direct the movements of the militia within lawful bounds. Troops shall not be directed to act under the orders of any civil officer. The powers and duties of the sheriff and other peace officers shall continue while the military are on duty, but they shall not interfere with military operations. The military shall assist the sheriff, if necessary, in executing process, orders, and decrees of the courts.

Sec. 9. *Powers as Peace Officers.* The officers and enlisted men of the National Guard, when called out on duty, shall, without further appointment or oath of office, be peace officers in the nature of a state police subject to the control of the law and the courts, and shall be held to act as such so long as they remain on duty, with the lawful powers of sheriffs and constables, for the purposes of conserving the peace and making arrests, and also the further and additional powers given by this act during proclamation of a state of insurrection.

Sec. 10. *Proclamation and Special Military Powers.* The Governor may, by proclamation, declare a state of insurrection to exist within a certain described district or city of the state. After the first publication of such proclamation, the additional powers as to arrest and use of force given by this act, beyond the ordinary powers of peace officers, may be exercised therein by the military under orders of the commanding officer. Such proclamation shall be issued under the seal of state, and shall be published three times in at least two newspapers of the district, or city, or as near thereto as possible. Such proclamation shall continue in force thirty (30) days only, but successive thirty (30) day proclamations may be issued and published while the insurrection or disorder continues. It shall be the duty of the Governor to ascertain when the state of insurrection is sufficiently suppressed, and to proclaim the termination of the special military powers beyond those of ordinary peace officers, at the earliest possible moment.

Sec. 11. *Dispersing a Mob.* Whenever a mob or crowd shall be unlawfully or riotously assembled, it shall be the duty of all peace officers, police, constables, and the sheriff of the county and his deputies, and any military force which may be present on duty, or either of them, to approach the persons so assembled, and in the name of the State to command them immediately to disperse.

When the persons so unlawfully assembled refuse, on command, to disperse, it shall be their duty to arrest and secure the offenders by use of such force as may be necessary, and to disperse the mob.

Sec. 12. *Justifiable Force against a Mob.* Troops called into action to disperse a riotous mob or unlawful assembly may be ordered to use such force against those engaged in a breach of the peace or threatening to do so, as the officer in immediate command, in the exercise of an honest and careful discretion, may deem necessary to disperse the mob or unlawful assembly, arrest the participants, and prevent violence and outrage. The fire of the troops should be withheld until timely warning has been given to disperse, and until other methods, less violent, appear hopeless. The military should not hasten to attack, even under abuse and provocation. Troops must never fire into a crowd unless ordered to do so by their commanding officer. Selected sharpshooters may be ordered to shoot down individual rioters, who have fired upon or thrown missiles at the troops. The probability that a mob may sooner or later commit crime or violence is not enough to warrant an attack upon them with deadly weapons; but if overt acts and threats of dangerous violence are persisted in, the troops shall proceed to

disperse the mob by force. The use of force and arms against any person must stop when his violence and resistance are overcome. Punishment belongs not to the troops but to the courts of justice.

Sec. 13. *Military Measures Presumed Justifiable.* If any officer or enlisted man of the National Guard, or any person aiding them, shall kill, wound, or injure any rioter or other person, or damage any property in dispersing a mob or riotous assembly, or in subduing or arresting participants in a riot or mob, or shall order or direct such act, such officer or enlisted man, or person shall be held guiltless, and such acts shall be held justifiable and lawful, unless it shall be clearly proved that such acts were outside the scope of or directly contrary to orders from a superior authority, or the acts were not done in good faith, or in the honest exercise of his discretion, or were reckless, oppressive, wanton, or malicious. Military force and authority must be exercised with firmness, kindness, and justice.

Sec. 14. *Defense at Public Cost.* If any officer, or soldier be sued in any civil suit or prosecuted for any charge of crime, in which the defense is that an act charged was committed in the proper performance of his military duty, the Governor is hereby authorized, in cases which to him appear meritorious, to order counsel to defend such officer or soldier, and all costs and expenses of defense, including special attorneys' fees of trial and appeal, shall be paid by the state, and a continuing appropriation is hereby made for such purpose.

(To be continued.)